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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC. and NATIONAL TRUCKING COMPANY, *Appellants*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Northern District of Georgia, Atlanta Division

JURISDICTIONAL STATEMENT

PAUL M. DANIELL
ROBERT E. BORN
1600 First Federal Building
Atlanta, Georgia, 30303
Attorneys for Appellant The Motor Convoy, Inc.

WATKINS & DANIELL
1600 First Federal Building
Atlanta, Georgia, 30303

SACK & SACK
Atlantic National Bank Building
Jacksonville, Florida, 32202
Of Counsel

MARTIN SACK
Atlantic National Bank Building
Jacksonville, Florida, 32202
Attorney for Appellant National Trucking Company

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JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, denying the injunction and dismissing the Complaint of appellants as plaintiffs in the Court below which sought to set aside, annul and declare void certain orders of the Interstate Commerce

Commission. Appellants respectfully submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia has been reported at 235 F. Supp. 250. The opinion, as amended, order, and judgment of the District Court is set forth in Appendix "A" attached hereto. There was no opinion of the Interstate Commerce Commission precedent to its orders.

JURISDICTION

Appellants, as plaintiffs, brought this action under Title 28 of the United States Code, Sections 1336, 1398, 2284 and 2321 through 2325; Title 5, United States Code, Sections 1007 and 1009; and Title 49, United States Code, Sections 17(9) and 305(g), to enjoin, annul and set aside orders of the Interstate Commerce Commission and a Certificate of Public Convenience and Necessity issued by that Commission. The initial opinion of the District Court was entered on October 2, 1964. By order of the District Court entered November 24, 1964, its initial opinion was amended and motion of plaintiffs for rehearing, reargument and reconsideration was denied. The final judgment of the District Court was entered on November 24, 1964. Notice of appeal was filed in the District Court on January 14, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253, § 2101(b) and §§ 2321-2325, inclusive. This Court has jurisdiction: *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60.

QUESTIONS PRESENTED

(1) Whether there was substantial competent evidence under permissible standards to support a determination of public convenience and necessity and fitness of the applicant by the Interstate Commerce Commission, as required by Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) for the extension of the motor carrier operating rights of Dixie Transport Company, where no shipper showed any present or future need for the extended authority and where there were qualified certificated carriers engaged in performing the service covered by the extension?

(2) Whether the District Court erred in holding that where a motor common carrier had held a certificate authorizing transportation of automobiles from a point of manufacture to a destination territory in all-motor carrier service, that a further finding of public convenience and necessity was not essential under Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) to an extension of such certificate to add new authority to cover transportation of automobiles in secondary movements from a railhead in the destination states to ultimate consignee, where adequate motor carrier service was already available and being utilized for the latter service and no shipper made any complaint of inadequate service or showed any present or future need for the extended authority?

(3) Whether under Section 8 of the Administrative Procedure Act (5 U.S.C. § 1007(b)) the Interstate Commerce Commission orders containing no reference to material issues of fact and law and no reasons or basis for its findings and conclusions, are therefore

unlawful and the Commission has failed to accord due process of law.

STATEMENT OF THE CASE

Appellant, The Motor Convoy, Inc., is a Georgia Corporation, being a motor common carrier authorized by the Interstate Commerce Commission to transport automobiles, in truckaway service, in secondary movements, between points in the States of Georgia and Florida, and between points in the State of Georgia, and between points in the State of Florida, in interstate or foreign commerce, as pertinent to this case.

Appellant, National Trucking Company, is a Florida Corporation, being a motor common carrier authorized by the Interstate Commerce Commission to transport automobiles, in truckaway service, in secondary move ments, between all points in Florida and between points in Florida and that part of Georgia on and South of U. S. Highway 78, in interstate or foreign commerce, as pertinent to this case.

Dixie Transport Company has held since October 26, 1939, a certificate from the Commission to operate as a motor common carrier transporting automobiles and trucks, in truckaway service, from Detroit, Michigan among other points, to points in the States of Florida and Georgia (except certain Georgia counties), known as initial authority.

The Interstate Commerce Commission found in *National Auto. Transporters Ass'n. — Declaratory Order,* 91 MCC 395, at page 413, that where a railroad originates traffic at Detroit, Michigan, as pertinent here, for transportation in rail service to a point in the destination area, Atlanta, Georgia, as an example

as pertinent here, a motor common carrier holding authority only from the plant site at Detroit, cannot pick up the traffic from the point of rail unloading but must possess appropriate "secondary" authority from the rail unloading point for delivery to ultimate destination.

In 1961, the Chrysler Corporation changed the routing of its automobile traffic from Detroit, Michigan to points in Georgia and Florida, shifting from all-motor carrier service to movement in rail multi-level cars to such railheads as Atlanta, Georgia and Jacksonville and Miami, Florida then in motor common carrier service beyond the railhead to the ultimate receiver.

After having filed and processed two applications before the Interstate Commerce Commission for secondary authority from railheads to ultimate receivers in the involved area, both of which were denied by the Commission after full hearing,[1] Dixie Transport Company filed a petition with the Interstate Commerce Commission on January 17, 1963, asking that its certificate be modified so as to grant it the appropriate authority to handle traffic from the railheads to ultimate destinations in Georgia (except certain counties) and Florida.

The petition of Dixie Transport was pursuant to a suggested procedure of the Commission in *National Auto. Transporters Ass'n., Declaratory Order, supra.* The Commission stated in its suggested procedure

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[1] *Docket No. MC-88300 (Sub-No. 23), Dixie Transport Company Extension—Florida,* decided April 18, 1961, not reported in full; and *Docket No. MC-88300 (Sub-No. 27), Dixie Transport Company Extension—Florida,* decided January 22, 1963, not reported in full.

that such a petition would be considered in the same light as an application filed under Section 207(a) of the Act (91 MCC 415).

The Interstate Commerce Commission granted the petition, without oral hearing and without shipper testimony, and issued a new certificate to Dixie Transport Company encompassing the authority which it had held since 1939, and adding thereto the authority to transport Chrysler automobiles from Atlanta, Georgia and Jacksonville and Miami, Florida to points in Florida and Georgia (except certain counties), in secondary movements, in truckaway service, restricted to traffic originating in rail service at Detroit, Michigan.

Appellants are carriers, among others, who hold operating authority and who have participated in the Chrysler traffic since 1961, from these railheads to this destination territory. Appellants brought this action to set aside the action of the Interstate Commerce Commission, after having exhausted their administrative remedies.

The case was heard on the record (pleadings actually) before the Commission and now before this Court. The District Court as especially constituted pursuant to 28 U.S.C. § 2325 and § 2284 was comprised of the Honorable Griffin B. Bell, Circuit Judge, Frank A. Hooper and Lewis R. Morgan, District Judges.

The District Court's opinion (Appendix A) indicated that in deciding adversely to appellants it:

(1) Considered the rights of Dixie Transport Company to transport automobiles from the plant at

Detroit, Michigan to points in the destination territory as encompassing some inherent privilege on Dixie's part to *follow the traffic* upon shipper's diversion to railroad transportation and continue to handle this traffic from railheads in the destination area without regard to the public convenience and necessity and irrespective of availability of adequate common carrier service from the railheads now meeting shipper's complete needs.

(2) Avoided any analysis of whether the requirements of Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) have been complied with by the Commission in granting the new certificate to Dixie Transport Company.

(3) Avoided any consideration of the manner the shipper has obtained deliveries from railheads since 1961 when diversion occurred to railroads at the plant nor the adequacy of that present service to meet the shipper's complete needs.

(4) Avoided any consideration of Dixie's two previous attempts and failures to prove public convenience and necessity for a similar service from these railroads.

(5) Avoided any consideration of whether the Commission's orders and procedure accorded due process of law under the Administrative Procedure Act. (5 U.S.C. § 1007).

On this appeal appellants contend that as a matter of law Dixie's prior authority to transport automobiles from the plant in Michigan forms no lawful basis in and of itself upon which the Commission could grant new authority to Dixie to transport automobiles from

railheads following independent movement by railroads; that proof of public convenience and necessity under Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) upon findings of fact supported by substantial probative evidence of record under minimum standards should have been required prior to the grant of the new certificate; and that failing in such, the Commission's action and the opinion of the District Court are clearly erroneous and wrong.

QUESTIONS ARE SUBSTANTIAL

This appeal presents questions of very substantial importance in the administration of Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) upon which the Supreme Court has not had the occasion to make any definitive determination and which are so substantial as to require plenary consideration by the Court. The paramount question of greatest importance relates to whether the Interstate Commerce Commission may lawfully devise and apply as the *sole criteria* of public convenience and necessity under said section a loss of business by a motor carrier resulting from a change in the method of distribution by a shipper; and whether, in one full sweep, the ICC may abandon the connotations of the nouns in the phrase "public convenience and necessity" which have evolved from over a half-century experience of government in the regulation of transportation.

While Congress has not specifically written into Section 207 of the Act each and every criteria which the Commission must consider in applying the statutory standards of public convenience and necessity, when it added the Motor Carrier Act to the Interstate Commerce Act in 1935, it chose the same words to state

conditions for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402(18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretations of the language. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. Now, the substantial question presented to the Supreme Court by this appeal is whether the Interstate Commerce Commission has exceeded its authority, ignored the mandate of Congress, and actually usurped the powers of Congress, by granting a certificate of public convenience and necessity upon a *sole criteria* which has no relation to the statutory standard of whether the proposed operations will be responsive to a public need and serve the public convenience and necessity.

The question is substantial and deserving of plenary consideration by the Supreme Court because of its implications far beyond the sphere of the immediate operations of the carriers here directly involved. While the question is of vast importance directly to the appellants herein insofar as their rights under the Act are concerned and thus deserving of the Court's plenary consideration on that basis alone, with broader scope, the question reaches right to the heart of how far the Commission may go in devising criteria, no matter how arbitrary, in administering Section 207 of the Interstate Commerce Act.

There is presented to the Court here a situation wherein the Commission twice found, after public hearing and full and complete procedure and application of the statutory standards, that the public convenience and necessity did not require operation by Dixie Transport Company in transporting ex-rail

traffic from railheads in Georgia and Florida to ultimate receivers in those states.[2] Although having twice been unable to find that the public convenience and necessity required such operation by applicant, the Commission nevertheless proceeded upon the mere petition of Dixie, without any public support whatever, to amend that carrier's certificate so as to grant new operating authority.

In so doing, the Commission issued no opinions or decisions including findings and conclusions, or the reasons or basis therefor, upon the material issues of fact, law or discretion presented. Thus, there is also presented to the Supreme Court a second and related substantial question as to whether the orders of the Commission are contrary to the provisions of the Administrative Procedure Act (5 U.S.C. § 1001, et seq.) and decisions of the Courts thereunder as not supported by adequate findings and conclusions, or the reasons or basis therefor, upon the material issues of fact and law.

While it cannot be determined directly from the Commission's orders the reasons or basis for its findings and conclusions upon the material issues of fact and law, a glance at the petition of Dixie Transport Company shows that the Commission could only have based its grant of authority to Dixie *solely* on the assertion of that carrier that it had some three years past participated in Chrysler automobile traffic from the manufacturing point of Detroit, Michigan to points in Georgia and Florida.

Unfortunately, the District Court did not come to grips with the real issue of whether the statutory

[2] Ibid., page 5.

standards had been met by the Commission. The District Court merely stated the misconception "Dixie only sought the right to permit railroads to do a part of its hauling, to-wit, from Michigan to Atlanta and Jacksonville, permitting Dixie to transport the automobiles the rest of the way." (Page 7, District Court Opinion, Appendix A). Its misconception of the factual and legal situation resulted in its conclusion that "the need for the transportation by Dixie had previously been established and Dixie had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." (Same page). The factual misconception is in that there is no *substitution* of rail carriage in lieu of motor carriage for part of the way; but rather there is an independent rail movement prior to the motor carriage. This independent rail carriage has been prevalent since 1961 and existing motor carriers with appropriate certificates have handled the traffic ex-rail since 1961.

That there was a misconception by the District Court of the factual and legal situation is borne out by the fact that it ordered page 5 of its original opinion stricken and substituted in lieu thereof a partial correction on motion of these appellants; yet, it did not go far enough to correct the rest of its opinion to comport with the true factual and legal situation.

It is apparent that the District Court conceived Dixie's rights to operate from Detroit to Georgia and Florida in a sense as if the larger rights from Detroit to Georgia and Florida encompassed the lesser right to operate from Atlanta, Jacksonville and Miami to

Georgia and Florida. Such conception is, of course, so grossly wrong as to be obvious. The interpretation of the Interstate Commerce Commission itself in *National Auto. Transporters Ass'n. — Declaratory Order,* supra, squarely refutes this conception of the District Court. The point here is that because of this misconception the District Court never reached the substantial questions of law in this case.

The Question Dealt With By a Lower Court

The question presented by this appeal is virtually identical to the so-called "follow the traffic" doctrine which the Commission and a lower Court have had occasion to deal with but which the Supreme Court has never considered. The "follow the traffic" doctrine has been squarely rejected as a sole criteria for public convenience and necessity by both the Commission and a lower court in other cases. This case now brings the question to the Supreme Court.

In its simplest form, the "follow the traffic" doctrine proposes that if a motor carrier is serving a shipper at its plant at point A, and the shipper then moves its production to point B (which the carrier cannot serve under its certificate), then irrespective of the adequacy of service by other carriers holding authority to service point B, the original carrier should be granted a certificate also to serve point B in order to avoid the economic impact of the loss of its business at point A. For many years this doctrine was considered by the Commission itself until finally it was squarely rejected as a basis for proof of public convenience and necessity and this rejection of the Commission was affirmed by the District Court, New Jersey, in *Smith & Soloman Trucking Co.* v. *United States,*

120 F. Supp. 277. A brief review of the Commission's rejection of this doctrine and the decision of the District Court for New Jersey thereon is essential at this point to place the question in perspective and show the parallel.

The Commission itself in *Smith & Soloman Trucking Co., Extension,* 61 MCC 748, discussed very succinctly the fallacy of the "follow the traffic" doctrine and we quote very briefly certain pertinent excerpts here from pages 752-753:

> ". . . the grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and to sound reasoning."
>
> ". . . we are restricted by the Act to the issuance of authority only where the proposed service is required by the public convenience and necessity."
>
> "There is one other aspect of this type of case which requires consideration. The declared transportation policy requires us to foster sound economic conditions in transportation. We are required, therefore, to consider among other things the effect of the injection of a new carrier, without proof of public need, on the existing competitive situation in the considered territory."
>
> "If motor common carriers in a given area are affording satisfactory service for the public, they should not be made to suffer by the entry of a new carrier, which in the first instance, is seeking to follow a particular shipper."

Further, we quote very briefly here from the decision of the District Court for New Jersey, supra:

> "The chief concern of the Commission, and rightly so, was to determine whether public convenience

and necessity required the granting of this application. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. This is the primary test under the statute and unless the application qualified under that test the Commission had no authority to allow it."

"The National Transportation Policy which the Commission had very much in mind and which is of vital importance in any decision on the instant title of transportation problem does make it mandatory on the Commission, as the latter states: 'to foster sound economic conditions in transportation.' By reason of that policy itself the Commission must carefully weigh the entire relevant situation."

These holdings of the Commission and the District Court never reached the Supreme Court. The issue is here presented to the Supreme Court as to whether the principles in the *Smith & Soloman* case are correct; and if those principles be correct, whether those principles are not binding on the Commission.

This appeal presents to the Supreme Court a variation of the facts, but not the theory. As we have shown in the statement of this case, supra, the factual situation presented here is that Dixie Transport Company previously held authority to transport automobiles from Detroit, Michigan to points in Georgia and Florida; and until 1961, it had participated in all-motor carrier movements of new Chrysler automobiles from the point of manufacture to receivers in Florida and Georgia. In 1961, Chrysler Corporation diverted the traffic to independent railroad origination at the plant for transportation in rail multi-level cars to railheads in Atlanta, Jacksonville and Miami with

independent motor transportation beyond to ultimate receivers.

There arose the issue whether carriers such as Dixie Transport Company holding authority to transport automobiles in initial service from manufacturing plants could, under that authority, transport the automobiles ex-rail from railheads in the destination states to ultimate receiver. The Commission in a declaratory proceeding said that the authority from the production points did not authorize the transportation from railheads and that appropriate authority from the railheads was required. This declaratory interpretation of the Commission was made in *National Auto. Transporters Ass'n.—Petition for Declaratory Order,* supra.

Dixie filed its petition on January 17, 1963, showing the Commission the diversion and asking that it be granted the new authority to handle the automobiles ex-rail from Atlanta, Jacksonville and Miami to points in Georgia and Florida. Thus, the parallel is shown between the circumstances existing in connection with the so-called "follow the traffic" doctrine. Indeed Dixie sought to follow the traffic in which it had previously participated by seeking new authority to handle the remaining motor carrier portion of the movement irrespective of the carriers who were already appropriately authorized and were then handling the ex-rail traffic.

A procedural method had been prescribed by the Commission in *National Auto. Transporters Ass'n.—Petition for Declaratory Order,* supra. After discussing the transition which had occurred in the automobile transporting industry involving a great

diversion to railroad service from all-motor service, the Commission authorized a procedural method as follows, at 91 MCC 415:

> "A great burden would be placed on applicants, protestants, and this Commission by the filing of individual motor carrier applications for appropriate authority where modifications of existing rights are necessary as a consequence of the interpretation made herein. Under the circumstances presented here, however, the same result may be accomplished by a filing of an appropriate petition to modify existing operating authorities so that the initial carrier may continue to participate in traffic in those instances where initial authority, as here interpreted, does not cover the movement. Such a petition should be filed in the same docket number in which the initial authority has been granted and would be considered in the same light as an application filed under Section 207(a) of the Act."

These appellants were parties to the proceeding, supra, where this procedure was prescribed. In view of the Commission's representation that any petition would be considered in the same light as an application filed under Section 207(a) of the Act, no appellate procedure was instituted upon the assumption that such representation could be relied upon.

These appellants, among other protestants, opposed the request of Dixie Transport Company in its petition, showing that the traffic had been moving effectively via the existing carriers for many months and requesting oral hearing and opportunity to present evidence and cross-examine witnesses on the issues of public convenience and necessity. Irrespective of these protests and requests for opportunity to present

evidence and cross-examine witnesses, the Commission issued a certificate to Dixie to perform the new service from the railheads on ex-rail traffic, in direct competition with these appellants and other existing motor carriers.

Thus, this appeal presents to the Supreme Court the substantial question of the validity of the sole criteria adopted by the Commission, this being the first actual grant of authority by the Commission implementing that criteria.

As shown above, the District Court (Appendix A) just simply failed to come to grips with the real legal issues in this proceeding because of its misconception concerning the factual situation. The effect of the District Court's refusal to enjoin the Commission's grant of authority to Dixie is to affirm a grant of authority upon facts and circumstances identical to the "follow the traffic" doctrine. That doctrine was completely repudiated in the *Smith & Soloman* decisions, supra, and its resurrection under the present variant is contrary to any proper concept of public convenience and necessity under Section 207 of the Interstate Commerce Act.

The validity of this "follow the traffic" doctrine, in any of its variations, presents a substantial question in the administration of Section 207 and the interpretation of public convenience and necessity, in view of the multitude and variety of economic and technological changes constantly taking place in the transportation field and the shippers' desire to take advantage of these situations by shifting their production points and utilizing different transportation combinations to effect savings in freight costs.

Contravention of the National Transportation Policy

There is the directly related and subsidiary question presented by this appeal as to whether the sole criteria devised by the Commission to grant the new certificate, which criteria is identical with the "follow the traffic" doctrine, is in direct contravention of the National Transportation Policy declared by Congress.

Section 207(a) of the Act must, of course, be administered within the framework of and giving due regard to the National Transportation Policy. *Interstate Commerce Commission* v. *Parker*, supra. That policy declared, in part, as follows:

> "It is hereby declared to be the National Transportation Policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . ." (49 USC preceding §§ 1, 301, 901 and 1001.)

The District Court of New Jersey in *Smith & Soloman*, supra, as well as the Commission itself in its own decision in that case, recognized the importance of the National Transportation Policy in administering Section 207 of the Act. The Court said:

> "By reason of that policy itself the Commission must carefully weigh the entire relevant situation. If after that, a carrier application based on a 'follow the traffic' conception is shown to be reasonably required by public convenience and necessity (which would include proper allowance for other carrier rights and for National Transportation Policy) the 'follow the traffic' principle invoked might well be the determining feature in the decision as to whether the application should be granted."

Thus, this appeal presents the substantial question of the extent to which the "follow the traffic" principle

contravenes the National Transportation Policy, when that principle, or one closely akin or identical thereto, becomes the sole criteria which the Commission devises to base grants of new and additional operating authority. It seems apparent that the District Court for New Jersey was eminently correct in its decision in *Smith & Soloman*, supra, that the Commission must weigh the *entire relevant situation*, and that in weighing the entire relevant situation, the Commission must consider other carriers' rights and the National Transportation Policy, or in other words, the adequacy or inadequacy of existing service.

It is submitted to the Court that the time has now come when there must be a final determination made as to what weight the "follow the traffic" principle can be given under the National Transportation Policy and under Section 207 of the Act upon the determination of public convenience and necessity. In the interest of the national transportation system the Court should determine this question, particularly since the Commission has elected to adopt such principle (or one so closely akin as not to be materially distinguishable) as the sole criteria, without considering the entire relevant situation.

Sufficiency of the Commission's Orders

The proposition that the Commission must carefully weigh the entire relevant situation leads next to the substantial question of whether the Commission's orders meet the minimum requirements of Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) which provides in part:

> "All decisions . . . shall become part of the record and include a statement of (1) findings and

conclusions, as well as the reason or basis therefor on all the material issues of fact, law or discretion presented on the record; . . ."

It is well settled that Section 8(b) of the Administrative Procedure Act applies to cases involving applications for certificates of public convenience and necessity. *Riss & Co., Inc.* v. *United States,* 341 U.S. 907; *Capital Transit Co.* v. *United States,* 97 F. Supp. 614 (DC-DC).

Of concern here is whether the Commission in its orders has made sufficient explication to enable the parties and a reviewing Court to understand with a fair degree of assurance why the Commission acted as it did and whether it did consider the entire relevant situation. The District Court in its opinion (Appendix A) avoided any determination of this issue.

It is apparent from prior decisions of the Supreme Court that this is a question of substantial importance in determining the validity of administrative decisions. One such case before the Supreme Court of the United States, even prior to the enactment of the Administrative Procedure Act, involved the State of Florida and the members of the railroad commission against the United States of America in which an order of the Interstate Commerce Commission was the subject of the litigation. The specific question involved was the lack of findings in the order to support it. In finding that the portion of the order of the Interstate Commerce Commission under review was not supported by the findings of the Commission, the Supreme Court held as follows:

". . . in order to sustain the statewide order . . . it must appear that there are findings, supported

by the evidence, of the essential facts . . . , which would justify that conclusion.

The question is not merely one of the absence of elaboration or of a suitable complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (Beaumont, S.L. & W.R. Co. v. United States, decided November 24, 1930, 282 U.S. 74, 91 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." *State of Florida et al.* v. *United States*, 282 U.S. 194, 75 L. Ed. 291.

Manifestly, the orders of the Commission here before this Court do not include any statement of findings and conclusions, nor reasons or basis therefor, on pertinent material issues of fact and law. The Commission issued no decision or opinion in support of its orders and merely stated in its order dated October 7, 1963, of record before the District Court, the ultimate finding "good cause appearing therefor; we find that the present and future public convenience and necessity require that Certificate No. MC-88300, dated October 26, 1939, be modified as set forth."

Therefore, the substantial question exists as to whether the Commission failed to accord due process of law and violated the provisions of the Administrative Procedure Act, supra.

The Appeal Important

As demonstrated herein, there are substantial legal questions raised on this appeal. The District Court did not come to grips with the legal questions; but affirmed the Commission's grant of authority on a misconception of both the factual and legal questions. Unless this appeal is heard by the Supreme Court, there will have been no appellate review of the judgment below. Substantial questions having been shown, this Court should note probable jurisdiction because Congress thought it so important that appellate review be given in an action against the Interstate Commerce Commission that it provided for a direct appeal to this Court, the highest in the land. 28 U.S.C. § 1253.

Unless the judgment of the Court below is reversed, appellant National Trucking Co., who has invested substantial sums and who has since 1961 responded to the needs of the Chrysler Corporation for the transportation of its automobiles from railheads, stands to have its traffic heart cut from its area of operation. Further, appellant The Motor Convoy will be deprived of potential traffic for which it holds the requisite authority, has operating facilities and has invested substantial sums responsive to the public need.

But, more than just the fate of these appellants is at stake. This is just the first instance where the Commission has granted the new and additional operating authority upon the sole criteria of prior participation in traffic in other areas. If the rights of existing carriers are to be ignored, virtually all ex-rail traffic handled by these carriers and all other carriers under existing appropriate authority stands

in jeopardy by the threat of a possible grant of authority to some other carrier who may have in years past moved traffic in all-motor carrier service from the production plant where such traffic is now moving via railroad from the production plant.

WHEREFORE, Appellants pray that this Court note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the Court below.

Respectfully submitted,

PAUL M. DANIELL
ROBERT E. BORN
1600 First Federal Building
Atlanta, Georgia, 30303
Attorneys for Appellant
The Motor Convoy, Inc.

MARTIN SACK
Atlantic National Bank
Building
Jacksonville, Florida, 32202
Attorney for Appellant
National Trucking Company

WATKINS & DANIELL
1600 First Federal Building
Atlanta, Georgia, 30303

SACK & SACK
Atlantic National Bank
Building
Jacksonville, Florida, 32202
Of Counsel

APPENDIX

[Filed October 2, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 8872

THE MOTOR CONVOY, INC., NATIONAL TRUCKING COMPANY, and FLORIDA CONVOY, INC., *Plaintiffs*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION and DIXIE TRANSPORT COMPANY, *Intervening Defendants*

Before Bell, Circuit Judge, and Hooper and Morgan, District Judges.

This is an action brought to enjoin, annul and set aside Orders of the Interstate Commerce Commission in Docket No. MC-88300 dated October 7, 1963, January 20, 1964, February 20, 1964 and Certificate of Public Convenience and Necessity No. MC-88300 issued to Dixie Transport Company on March 11, 1964.[1]

Prior to October 15, 1962 Dixie Transport Company held authority from the Interstate Commerce Commission for the interstate transportation of automobiles and trucks from their place of manufacture in Michigan to destinations in Florida and Georgia, excepting certain named counties. Dixie therefore must be classified as an "ini-

[1] Petitioner complains that the Commission issued said certificate without giving opportunity for protestants to introduce evidence in opposition thereto. The material facts in the record are stated below.

tial carrier'' pursuant to Administrative Ruling #75 issued by the Commission in 1938 and providing as follows:

> "The term 'Initial Movements' means transportation of *new motor vehicles* from a place of manufacture or assembly, specifically authorized to be served as a point of origin by the originating carrier's certificate or permit, to any point or place upon the authorized route or within its defined territory for delivery to consignee or to a connecting carrier.
>
> "The term 'Secondary or Subsequent Movements' means transportation of motor vehicles, *except transportation of new motor vehicles from a place of manufacture or assembly,* by a carrier to, from, and between all points and places upon its authorized route or routes or within its authorized territory for delivery to consignee or connecting carriers. Such movements also include cross movements, back hauls, and movements to and from body and speciality plants upon the route or routes or within the authorized territory of the carrier." (Italics supplied)

With the new and modern methods of transporting new automobiles Dixie Transport Company found its revenues were taking a substantial slump. It therefore applied to the Commission for a modification of its certificate so as to entitle petitioner to transport such automobiles only from Atlanta, Georgia and Jacksonville, Florida to the same points in Florida and Georgia as covered by its original certificate, but permitting the shipments from Michigan to Atlanta and Jacksonville to be made by rail by use of "trailer on flat car" (TOFC) service (sometimes referred to as "rail piggy-back" or by "multi-level rail car" (MLRC). The Commission properly took cognizance of the fact that the two methods of transportation just referred to had caused a substantial trend from

motor transportation to rail transportation. It accepted the affidavit from Dixie Transport Company showing that this trend had caused Dixie a substantial loss in income, although Dixie had previously expended considerable sums of money in preparing to exercise its rights under its certificate. The truthfulness of said affidavit was not contraverted in these proceedings.

The Commission did in fact decline to have a hearing upon the question of convenience and necessity in connection with Dixie's proposed transportation of new automoblies from Atlanta and Jacksonville to various dealers in the area involved. This Court fails to find in the record, however, any statement as to the nature of the testimony which protesting carriers desired to introduce before the Commission, nor does this Court find any resume or statement of the same in the briefs filed in this case. This omission will be discussed hereinafter.

The reason why the Commission did not entertain further evidence cannot be understood without a careful reading and study of the Order entered October 15, 1962 in the matter of "National Automobile Transporters Association Petition for Declaratory Order, No. MC-C-3024." That proceeding was brought by National Automobile Transporters Association (NATA) seeking a declaratory order interpreting Administrative Ruling #75 quoted above.

> "and grants of motor carrier operating authority which follow that ruling, particularly insofar as the meaning of the terms 'initial' and 'secondary' movements as used in such authorities are concerned."

NATA is an intervenor in this action and all other parties to this action were also parties before the Commission in the above proceeding, hereinafter referred to as the "NATA proceeding."

In NATA at page 409 the following language appears:

> "The original issue presented by petitioner is whether a motor carrier authorized to handle initial movements of motor vehicles may accept such traffic at an authorized point of manufacture or assembly and, without obtaining additional authority, transport it to any point in its initial movement territory by utilizing rail TOFC service, or any comparable rail service, for some intermediate portion of the movement. If such delivery of an initial-movement shipment to a rail point of service does not constitute an interchange which ends the initial nature of the haul, then the initial hauler would be able to effect substitution, without additional authority to and from the intermediate points."

The same question was elsewhere stated in the following language:

> "This petitioner seeks a ruling as to whether a motor carrier holding initial authority only from A to D may transport the said traffic to B a nonservice point intermediate to D, there load it on a rail flatcar, for handling in trailer-on-flatcar or 'piggyback' service to C, another nonservice point intermediate to D, where it would take possession of the shipment and move it to destination, without first obtaining specific authority either to serve B and C or to operate from C to D."

The undisputed facts in the instant case bring Dixie Transport Company squarely within the above stated circumstances for Dixie was a motor carrier authorized to handle initial movements of motor vehicles from Michigan to Georgia and Florida, it did desire "without obtaining additional authority," to transport the same "to any point in its initial movement territory by utilizing rail TOFC

service or any comparable rail service." The Commission in the NATA case ruled:

> "The use by motor carriers of TOFC substitution permits each mode of transportation to best utilize its inherent qualities to provide shippers and the public generally with an efficient and economical service. This Commission has encouraged such transportation developments in the past, and there is no reason at this point to further question the legality of a method of operation long used by the industry and recognized by the Commission's decisions and regulations."

Having made the above ruling the Commission considered the manner in which it would be implemented in the future and (see M.C.C. 415):

> "A great burden would be placed upon applicants, protestants, and this Commission by the filing of individual motor carrier applications for appropriate authority where modifications of existing rights are necessary as a consequence of the interpretation made herein. Under the circumstances presented here, however, the same result may be accomplished by the filing of appropriate petitions to modify existing operating authorities so that the initial carrier may continue to participate in traffic in those instances where initial authority, as here interpreted, does not cover the movement. Such a petition should be filed in the same docket number in which the initial authority has been granted *and would be considered in the same light as an application filed under section 207(a) of the Act.*" (Emphasis supplied)

Plaintiffs in this action lay great stress upon the italicized language above, contending with great force that the Commission in the Dixie application matter did not consider the same "in the same light as an application filed under

section 207(a) of the act," contending that said section 207(a) requires a full hearing followed by complete Findings of Fact showing convenience and necessity. A strict and literal interpretation would no doubt sustain this contention of the plaintiffs. Viewed, however, in the context of the facts in the record and the entire Order of the Commission in the Dixie application we find such criticism to be unmerited for reasons stated below:

Reduced to its simplest terms the situation is this: Dixie Transport Company had the authority to transport new automobiles from Michigan to all points in Florida and Georgia with the exception of certain named counties. In making such transportation it performed all of the hauling and received all of the revenue, and the protesting carriers received nothing. Dixie's application for modification only sought the right to permit railroads to do a part of its hauling, to-wit, from Michigan to Atlanta and Jacksonville, permitting Dixie to transport the automobiles the rest of the way. The need for the transportation by Dixie had previously been established and Dixie had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way.

The status of the complaining carriers would not be affected by the situation aforesaid, for as long as Dixie continued to be selected by the shippers to perform this service they could not obtain it. On the other hand, to deny Dixie the modification sought would mean that Dixie, which had the right to transport the cars all the way, would then be prevented from substitute rail carriage for motor carriage a part of the way, an improved procedure found by the Commission to be decidedly in the public interests.

We are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing, nor do we wish to set an unfortunate

precedent for future applications wherein it might clearly appear there is relevant testimony that should be considered by the Commission.

Counsel will present a judgment in accordance herewith.

This the 2nd day of October, 1964.

s/ GRIFFIN B. BELL
United States Circuit Judge

s/ FRANK A. HOOPER
United States District Judge

s/ LEWIS R. MORGAN
United States District Judge

[Filed Nov. 25, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 8872

THE MOTOR CONVOY, INC., NATIONAL TRUCKING COMPANY, and FLORIDA CONVOY, INC., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order

On October 2, 1964, this Court filed its opinion in the above-entitled case to the effect that the orders of the Interstate Commerce Commission complained of are valid and lawful in all respects. On or about October 26, 1964, plaintiffs filed a Motion for Rehearing, Reargument and Reconsideration. Replies to that Motion were filed on or about November 3, 1964, by defendants the United States of America and the Interstate Commerce Commission, and on

or about November 7, 1964, by intervening defendant National Automobile Transporters Association.

After considering the above-described Motion and the Replies thereto, this Court has concluded that the opinion dated October 2, 1964, should be amended as hereinafter specified, and that the Motion for rehearing, reargument and reconsideration should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the opinion of this Court dated October 2, 1964, be, and it is hereby, amended by striking page 5 of the typewritten copy of said opinion and inserting in lieu thereof a new page 5, which shall read as follows:

> "This petitioner seeks a ruling as to whether a motor carrier holding initial authority only from A to D may transport the said traffic to B, a nonservice point intermediate to D, there load it on a rail flatcar, for handling in trailer-on-flatcar or 'piggyback' service to C, another nonservice point intermediate to D, where it would take possession of the shipment and move it to destination, without first obtaining specific authority either to serve B and C or to operate from C to D."

The Commission ruled that a carrier holding initial authority could perform the type of operations described above. As pertinent to the instant case, however, the Commission further ruled (91 M.C.C. at 413):

> "Similarly in those instances where a railroad or, as an example, motor carrier 'A', originates the traffic, motor common carrier 'B' cannot pick up the traffic from the rail unloading point under its initial authority but must possess appropriate secondary authority from the rail unloading point for delivery to ultimate destination. * * * "

The undisputed facts in the instant case bring Dixie Transport Company squarely within the above stated cir-

cumstances for Dixie was a motor carrier authorized to handle initial movements of motor vehicles from Michigan to Georgia and Florida, and it did desire "in those instances where a railroad . . . originates the traffic" to "pick up the traffic from the rail unloading point . . . for delivery to ultimate destination."

The Commission in the NATA case ruled:

> "The use by motor carriers of TOFC substitution permits each mode of transportation to best utilize its inherent qualities to provide shippers and the public generally with an efficient and economical service. This Commission has encouraged such transportation developments in the past, and there is no reason at this point to further question the legality of a method of operation long used by the industry and recognized by the Commission's decisions and regulations."

Having made the above ruling the Commission considered the manner in which it would be implemented in the future and ruled: (see 91 M.C.C. 415):

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all motions for rehearing, reargument and reconsideration be, and they are hereby, denied.

Dated at Atlanta, Georgia, this 24th day of November, 1964.

GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

FRANK A. HOOPER
Frank A. Hooper
United States District Judge

LEWIS R. MORGAN
Lewis R. Morgan
United States District Judge

[Filed Nov. 25, 1964]

Judgment

This Court on October 2, 1964, having entered its opinion to the effect that the orders of the Interstate Commerce Commission complained of are valid and lawful in all respects, and on November 24th, 1964, having entered its order amending the aforesaid opinion and denying all motions for rehearing, reargument and reconsideration,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the injunction prayed for be, and it is hereby, denied, and that the complaint be, and it is hereby dismissed.

Dated at Atlanta, Georgia, this 24th day of November, 1964.

GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

FRANK A. HOOPER
Frank A. Hooper
United States District Judge

LEWIS R. MORGAN
Lewis R. Morgan
United States District Judge